

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARREL L. GRIFFEY,

Defendant - Appellant.

No. 03-30541

D.C. No. CR 02-0144-BLW

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted March 7, 2005
Seattle, Washington

Before: FERNANDEZ, TASHIMA, and GOULD, Circuit Judges.

Darrel L. Griffey appeals his conviction and the sentence imposed following a jury trial on three counts of drug charges. Griffey contends that his statutory right to a speedy trial was violated and that his sentence should be vacated and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

remanded pursuant to United States v. Booker, 125 S. Ct. 738 (2005).¹ We have jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We affirm the conviction but remand the sentence to the district court.

We reject Griffey's contention that the district court's January 2003 order granting co-defendant Merlin Brower's motion for a continuance did not sufficiently weigh the necessary factors in determining that a continuance would serve the ends of justice.² Contrary to Griffey's contention, the continuance that he challenges was not based on the "ends of justice" exclusion, found in 18 U.S.C. § 3161(h)(8)(A), but on the need to conduct a mental examination of Brower, which is a delay that is expressly excludable under 18 U.S.C. § 3161(h)(1)(A). The statute does not require consideration of the "ends of justice" factors for excluding a period of delay resulting from proceedings to determine a defendant's mental competency. See 18 U.S.C. § 3161(h)(1)(A); United States v. Daychild, 357 F.3d 1082, 1094 (9th Cir. 2004) (holding that the district court properly excluded the time needed to determine the defendant's competence to stand trial). There is no

¹ At oral argument, Griffey conceded his claim that the district court erred in denying his motion for a new trial on the grounds of newly discovered evidence.

² Because the parties are familiar with the facts and the prior proceedings, we do not recite them here except as necessary to aid in understanding this disposition.

evidence in the record that Griffey ever objected to any of the continuances sought by his co-defendants, and he did not file a motion for severance until May 2003, after the court had granted a continuance four times. We therefore reject Griffey's claim that his right to a speedy trial was violated.

With respect to Griffey's challenge of his sentence, we cannot determine "whether the district court would have imposed a materially different sentence at the time of sentencing had it known that the Guidelines were advisory rather than mandatory." United States v. Ameline, 409 F.3d 1073, 1083 (9th Cir. 2005) (en banc). Because we conclude that "it is not possible to reliably determine from the record" the answer to that question, "we will remand to the sentencing court to answer that question." Id. at 1084.

AFFIRMED and REMANDED.